IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs November 27, 2007

STATE OF TENNESSEE v. NICHOLAS SHAWN MARSHALL

Direct Appeal from the Circuit Court for Marshall County
Nos. 17364, 17365, 17366 Robert Crigler, Judge

No. M2007-00425-CCA-R3-CD - Filed March 13, 2008

The appellant, Nicholas Shawn Marshall, pled guilty in the Marshall County Circuit Court to three counts of aggravated burglary, and he received a total effective sentence of eight years incarceration in the Tennessee Department of Correction. On appeal, the appellant challenges the trial court's denial of alternative sentencing. Upon our review of the record and the parties' briefs, we affirm the judgments of the trial court but remand for an entry of a corrected judgment reflecting that case number 17365 is to be served consecutively to case number 17364.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court are Affirmed; Case Remanded.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which, ALAN E. GLENN and D. KELLY THOMAS, JR., JJ., joined.

Andrew Jackson Dearing, III, Shelbyville, Tennessee (at trial and on appeal), and Mike Collins, Lewisburg, Tennesseee (at trial), for the appellant, Nicholas Shawn Marshall.

Robert E. Cooper, Jr., Attorney General and Reporter; Clarence E. Lutz, Assistant Attorney General; Charles Crawford, District Attorney General; and Weakley E. Barnard and Brooke Grubb, Assistant District Attorneys General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

On December 13, 2006, the appellant entered guilty pleas to three counts of aggravated burglary. The pleas resulted from three multi-count indictments charging the appellant with aggravated burglary and theft. At the guilty plea hearing, the State read the following from the appellant's statement to police as the factual basis for the pleas:

> "On August 17, 2006, around 10 a.m. I broke into a house on 3rd Avenue. I used a TennCare card to pop the lock and I went inside.

Once inside I took some clothes: Four shirts, two pants. I also took a couple of rings –"

The 3rd Avenue house, Your Honor, would actually be the residence involved in case 17366.

"Two pants. I also took a couple of rings. Belt, brown with white stitches. Some fishing poles and tackle box. Also a bike. I also took a box of Nutty Bars. I opened the box up and took the Nutty Bars out of it. I put the stuff in a grocery bag I found under the sink and carried the fishing poles and bike back to my apartment on 5th Avenue.

Then I came back and got the rest of the stuff and took it back to my apartment.

Also sometime last week, possibly Friday, I broke into a house on 5th Avenue North. It was a rock house off across from my apartment."

That would be the case involved in either 17364 or 17365.

"It was a rock house across from my apartment. The window was cracked. I pulled the glass out and unlocked the window into the basement and went in. I took a $100 bill, play station, and several games, guitar, JVC camcorder about –" it says "three ounces of marijuana. A silver watch with a blue face. Also a 9 millimeter pistol Taurus.

I went back out the window I came in and took all of the stuff to my apartment. I took the guitar and camcorder to a pawn shop by Eastside Liquors. I traded the Taurus pistol for $200 worth of crack. I gave it to a black male, tall and skinny around 45 years old. I don't know his name.

Also Monday or Tuesday I broke into a house beside the rock house on the school side."

That would also be a residence on 5th Avenue in case 17364 and 365. They were residences on 5th Avenue.

I didn't know – "rock house on the school side. I used a push mower to stand on pull the screen out and the window was unlocked.

> I went in and all that was in there were several tires laying around. After I couldn't find anything I went out a side window on the school side, then I went up some steps right there and went through another window that was unlocked. The only thing up there was a sink and it looked like they were remodeling. I couldn't find anything so I went back to my apartment."

Pursuant to the plea agreement, the appellant was sentenced as a standard Range I offender to four years on each count. The appellant was ordered to serve the sentences for convictions arising out of case numbers 17364 and 17365 consecutively, while the sentence for case number 17366 was to be served concurrently, for a total effective sentence of eight years. The appellant was also ordered to pay restitution.

The appellant requested alternative sentencing, and a sentencing hearing was held. Beth Flatt, with the Probation and Parole Department, testified that she had prepared the appellant's presentence report. The nineteen-year-old appellant told Flatt that he was addicted to crack cocaine and had committed the offenses to obtain money to pay rent and support his crack cocaine habit.

Flatt stated that the appellant had been given a probationary sentence for a driving under the influence (DUI) conviction less than a month before he committed the instant offenses and had twice violated probation as a juvenile. Flatt said that the appellant had numerous juvenile adjudications, including an adjudication for a theft offense which would have been considered a felony if the appellant had been an adult. Flatt said that the appellant told her that he is a "long time illegal substance drug user." The appellant told Flatt that if he were granted alternative sentencing, he would like to live with his brother, a convicted felon who is on parole.

The appellant testified that if he were granted alternative sentencing he could get a job at Randstad in Shelbyville and pay the restitution. The appellant said that he became addicted to crack cocaine when he was eighteen years old, and he broke into houses to get money to pay rent and purchase crack cocaine. The appellant acknowledged that his crack cocaine habit was destroying his life. The appellant stated that after serving five or six months in jail for these offenses, he had "dried out and [gotten his] head straight again." He said he had learned that he needed to stay away from crack cocaine and pledged to never use the drug again.

The appellant said that if he were granted alternative sentencing he would be willing to undergo treatment and random drug screens, knowing if he failed the test that he would be "locked back up." The appellant said that if he were released he would live with his mother.

The appellant expressed remorse for his crimes. The appellant said that he had been reading the Bible and acknowledged that he would never "pull anything like this again."

The appellant testified that as a juvenile he was sent to Woodland Hills, a juvenile detention facility where he obtained his GED. He admitted that he had been released on probation from the

facility and had violated that probation. The appellant also admitted that he had committed the instant offenses less than one month after being placed on probation for his DUI conviction.

At the conclusion of the sentencing hearing, the trial court denied alternative sentencing, finding that measures less restrictive than confinement had been unsuccessfully applied to the appellant and that the appellant had poor potential for rehabilitation. On appeal, the appellant challenges the trial court's denial of alternative sentencing.

II. Analysis

Appellate review of the length, range or manner of service of a sentence is de novo. See Tenn. Code Ann. § 40-35-401(d) (2003). In conducting its de novo review, this court considers the following factors: (1) the evidence, if any, received at the trial and the sentencing hearing; (2) the presentence report; (3) the principles of sentencing and arguments as to sentencing alternatives; (4) the nature and characteristics of the criminal conduct involved; (5) evidence and information offered by the parties on enhancement and mitigating factors; (6) any statement by the appellant in his own behalf; and (7) the potential for rehabilitation or treatment. See Tenn. Code Ann. §§ 40-35-102, -103, -210 (2003); see also State v. Ashby, 823 S.W.2d 166, 168 (Tenn. 1991). The burden is on the appellant to demonstrate the impropriety of his sentences. See Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments. Moreover, if the record reveals that the trial court adequately considered sentencing principles and all relevant facts and circumstances, this court will accord the trial court's determinations a presumption of correctness. Id. at (d); Ashby, 823 S.W.2d at 169.

Initially, we recognize that an appellant is eligible for alternative sentencing if the sentence actually imposed is ten years or less. See Tenn. Code Ann. § 40-35-303(a) (2006). The appellant's sentence makes him eligible for alternative sentencing. Moreover, an appellant who is an especially mitigated or standard offender convicted of a Class C, D, or E felony is presumed to be a favorable candidate for alternative sentencing. See Tenn. Code Ann. § 40-35-102(6). In the instant case, the appellant is a standard Range I offender convicted of Class C felonies; therefore, he is presumed to be a favorable candidate for alternative sentencing. However, this presumption may be rebutted by "evidence to the contrary." State v. Zeolia, 928 S.W.2d 457, 461 (Tenn. Crim. App. 1996). The following sentencing considerations, set forth in Tennessee Code Annotated section 40-35-103(1), may constitute "evidence to the contrary":

> (A) Confinement is necessary to protect society by restraining a defendant who has a long history of criminal conduct;
>
> (B) Confinement is necessary to avoid depreciating the seriousness of the offense or confinement is particularly suited to provide an effective deterrence to others likely to commit similar offenses; or
>
> (C) Measures less restrictive than confinement have frequently or recently been applied unsuccessfully to the defendant.

Zeolia, 928 S.W.2d at 461.

The trial court denied the appellant alternative sentence, stating that "[m]ost importantly I find that lesser restrictive measures than confinement have been applied unsuccessfully to the [appellant]." The record reflects that the appellant violated probation at least twice as a juvenile and committed the instant offenses less than one month after he was granted probation for a DUI conviction. We, like the trial court, conclude that such continued disregard of the law in the face of the largess of the court does not bode well for the appellant's rehabilitative potential. Therefore, we conclude that the trial court did not err in denying the appellant alternative sentencing.

We note that our review of the record reveals that the judgment of conviction for case number 17365 indicates that the sentence for that offense is to be served consecutively to case number 17365, clearly a typographical error. Therefore, we must remand for an entry of a corrected judgment reflecting that case number 17365 is to be served consecutively to case number 17364.

III. Conclusion

Based upon the foregoing, we affirm the judgments of the trial court but remand for an entry of a corrected judgment.

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NORMA McGEE OGLE, JUDGE